

## WHY ENTRENCH?

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Most of the time the rules that determine the process by which an institution makes law are constant across the range of its law-making activities. Amongst other things, these rules set the quorum for the body, the number of times it must consider and vote on a proposal, and the number of office-holders in the institution who must approve the measure before it becomes law. Though the body may make decisions on many different areas of law, these procedural rules – what we might describe as the institution’s default rules – remain the same. These rules should have been chosen for good reasons; they should help the institution succeed in its constitutional role, and, consequently, departure from them requires an explanation. Why, in this instance, not apply the default rules? This paper considers situations in which law-making has been rendered harder: situations in which an area of law has been entrenched, and an institution must engage in a special and more arduous process to change the law.<sup>1</sup>

In academic discourse entrenchment has proved a polarising topic: scholars tend to either regard it as a boon or a vice. Entrenchment has been praised as a device that lends certainty and stability to law, and has been commended as the hallmark of constitutionalism. On the other hand, others have warned that entrenchment runs contrary to democratic values, making it hard for legislatures to modernise the law, and can cause friction between constitutional institutions. Whilst there is some truth to most of these claims, this paper argues for a middle course: entrenchment sometimes brings benefits but also presents hazards. Entrenchment comes in a number of different forms, and there are a number of different reasons why we might want to entrench areas of law. This paper argues that entrenchment rules are at their

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<sup>1</sup> The paper consequently does not consider eternity clauses, on which see: R. Albert, *Constitutional Handcuffs* 42 ARIZONA STATE LAW JOURNAL 664 (2010) and Y. ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: A STUDY OF THE NATURE AND LIMITS OF CONSTITUTIONAL AMENDMENT POWERS Ph.D Thesis submitted to LSE, February 2014.

most attractive when there is a connection between the reason for entrenchment, the manner of entrenchment adopted, and the area of law entrenched. When these three elements connect, a strong case for entrenchment can be made. When they come apart it is harder – though not necessarily impossible – to defend entrenchment.

The paper starts by giving an account of the nature of entrenchment and the various forms that entrenchment can take. A typology of entrenchment will be advanced. Three groups of types of entrenchment are identified: those rules that require a rule altering the law to take a certain form, those rules that require the institution to spend extra time considering the alteration to the law, and, finally, those rules that expand the unit that must approve the change. Cross-cutting these distinctions are three further variables. First, entrenchment rules can be self-imposed – the institution making it harder for its future incarnations to alter the law in an area – or imposed on that institution by another constitutional body. Secondly, the entrenching rule may, itself, be entrenched (it is ‘self-embracing’) or the institution may be competent to alter the entrenching rule using its default process for legal change. Finally, the entrenching rule may automatically apply in a given area or it may empower some other group or institution to render it harder for the institution to alter the law: the entrenchment may be ‘triggered’ by this other party.

The middle part of the paper uses this typology to illuminate the arguments for and against entrenchment. These considerations should connect with the area of law entrenched – determining the reach of entrenchment – and with the variety of entrenchment rule adopted – determining the manner of entrenchment. The paper concludes by considering three examples of entrenchment two of which – the consociational rules establishing the Northern Ireland Assembly and the European Protocol on Subsidiarity – show a tight connection between these three, whilst the third – the Senate’s filibuster rule – is more debatable.

The paper provides a set of arguments that should inform constitutional actors considering making use of entrenchment. It provides guidance to constitutional designers – whether in constituent assemblies or legislatures – who are facing problems that might be alleviated by entrenchment: the paper identifies situations in which entrenchment may be valuable, and suggests types of entrenchment that may be

appropriate for these situations. It also provides guidance to judges, who may be required to decide whether to uphold entrenchment, or be compelled to interpret entrenching rules. The arguments in this paper show the strengths, and the dangers, of different forms of entrenchment – and help determine whether the courts should give an entrenching rule a broad or narrow interpretation.

## 1. A Typology of Entrenchment

There is no consensus amongst lawyers and political scientists about the nature of entrenchment. Different writers use the term to refer to differing sets of constitutional devices. At its most general, entrenchment has been used to describe any rule that is difficult to alter.<sup>2</sup> There is a sense in which we could talk of the rules that constitute the British National Health Service as being politically entrenched; whilst the NHS is established through ordinary statute law, it enjoys strong support from the public and it is virtually impossible to imagine any political party campaigning for its removal. Taken this broadly, almost all legal rules are entrenched to some degree. After all, most legal rules have a quality of stickiness: their removal will unsettle or disturb expectations and there will be some opposition to their change. At the other extreme, Eric Posner and Adrian Vermeule provide a sharp, legal, definition of entrenchment.<sup>3</sup> On their account, entrenchment exists when a legislative body passes a rule that binds its future incarnations. The Canadian Bill of Rights is an example of a piece of legislation of this type: the statute was passed by the Canadian Parliament, and purports to constrain that institution. Vermeule and Posner's model of entrenchment would not extend to limitations on an institution that have been imposed by another constitutional body – so, for example, the special legislative procedures found in the Northern Ireland Act are set for the Northern Ireland Assembly by the United Kingdom Parliament, and consequently would not be included in their account.

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<sup>2</sup> D. J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment* 124 HARVARD L. R. 627, 672 (2011); M. SCHWARTZBERG, DEMOCRACY AND LEGAL CHANGE, chapter 1 (2007).

<sup>3</sup> E. Posner and A. Vermeule, *Legislative Entrenchment: A Reappraisal* 111 YALE L. J. 1665, 1667. (2002)

This paper charts a middle course. It takes entrenchment to signify a legal rule that makes it more difficult for a body to change the law in an area that, but for the entrenching rule, would fall within its jurisdiction, and be alterable under the default rules of legal change. We can distinguish between the entrenching rule – the legal rule that renders change harder in a specified area – and the legal rules that are entrenched – those rules that are within the area specified by the entrenching rule. This account of entrenchment is narrower than the political scientists’ understanding, but broader than Posner and Vermeule’s interpretation. It does not encompass political entrenchment; just because a rule is practically or politically hard to alter does not render it entrenched on this account. On the other hand, whilst this understanding of entrenchment includes all the examples that fall within Posner and Vermeule’s category, it also includes some limits that are imposed on an institution by another body. So, a rule of a written constitution which imposed, in certain areas, a requirement of a supermajority on the legislature would amount to entrenchment on this account, but would fall outside of Posner and Vermeule’s definition.

Entrenchment is a broad term with a range of acceptable uses, and the attractions of the definition adopted will depend in large part on its capacity to illuminate aspects of constitutions and legal orders. This paper focuses on legal rules that, when compared with an institution’s default rules for law-making, render change more difficult. This limitation – the focus on legal entrenchment and the setting aside of political entrenchment – is justified by the commonalities of issues arising around legal entrenchment. The various forms of legal entrenchment discussed in the paper are ones that can be adopted by law-makers directly: the entrenching rule is chosen by the law-maker, and has a particular form. Political entrenchment, in contrast, is harder for the law-maker to bring about – it depends on the attitudes of the political community – and, consequently, it may prove harder to shape the form that political entrenchment takes. As a corollary of this, legal entrenchment almost always involves, or has the potential to involve, the courts, whilst judges have far less involvement in political entrenchment. There is, then, a utility in concentrating attention on legal entrenchment, and reasons for treating it as a distinct area of study.

However, whilst this paper concentrates exclusively on legal entrenchment, it should be acknowledged that the divide between legal and political entrenchment is a

fine one. Sometimes political entrenchment can be effected by convention, that is, brought about by a non-legal constitutional rule.<sup>4</sup> Entrenchment by convention is an important topic that merits its own paper, but, for now, it is enough to note that many of the entrenchment rules discussed in this paper could be grounded in a non-legal constitutional rule. Conventions could require that a referendum be held before a particular element of law is altered,<sup>5</sup> or could demand that the federal level of government secure the agreement of the states before changing the constitutional balance between the centre and the regions.<sup>6</sup> Much of the discussion of legal entrenchment found in this paper will also be applicable to the attractions and functioning of these non-legal, political, conventions. Furthermore, political entrenchment can be fostered – if not directly created – through the operation of law. Sometimes, legal entrenchment may bring about political entrenchment: the community may come to regard the presence of legal entrenchment as signifying an area of law ought not to be changed. Sometimes other types of legal rules might also have this effect: a eulogistic preamble to a statute may influence the way citizens assess the value of the rules within that document.

The constraints imposed by legal entrenchment can be distinguished from rules that limit the body's jurisdiction: when a rule is entrenched it is either within the institution's jurisdiction to change that rule through the process specified by the entrenching rule, or, where the entrenching rule requires the agreement of another body, to initiate that change. The institution may not be able to change the entrenching rule itself (that rule may be part of a constitution or statute that is outside the jurisdiction of the institution) but it must be able to alter the laws protected by entrenchment using the processes specified by that rule. Similarly, this paper does not discuss legal instruments enacted by one body that accord another institution only a limited power to alter the provisions of that document: these are instruments that the second institution lacked jurisdiction to enact, even if it now possesses a limited power to change. So, for example, a legislature may be accorded the power to initiate

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<sup>4</sup> On constitutional conventions, see N. W. BARBER, *THE CONSTITUTIONAL STATE*, chapters 5 and 6 (2010).

<sup>5</sup> M. Qvortrup, *Democracy by Delegation: The Decision to Hold Referendums in the United Kingdom* 42 REPRESENTATION 59 (2006).

<sup>6</sup> G. MARSHALL, *CONSTITUTIONAL CONVENTIONS*, chapter 11 (1987).

a change to a constitution enacted by a constituent assembly, but these constitutional rules are not ‘entrenched’ against it within the terms of this paper. Consequently, the American Constitution is not entrenched in this sense – the United States Congress does not have, and did not have, jurisdiction to enact the Constitution, though it can initiate changes to that document. In contrast, some of the constitutions of the states of America were enacted by their legislatures, and are entrenched against these bodies.

When entrenchment is discussed the subject of the entrenchment is normally – perhaps almost invariably – a legislature. That legislatures are ordinarily central to the topic is unsurprising: on the common understanding of the separation of powers it is legislatures, rather than other branches of the constitution, that change the law. But few modern scholars would accept this simplistic account of legal change. Other bodies – in particular, the courts – also have the power to make law and can also be the subjects of entrenchment rules.

Though courts and legislatures make law in different ways,<sup>7</sup> similar questions can be raised about the process through which the power is exercised. As with legislatures, the legal system specifies a set of default rules through which courts can effect legal change. The default rules of the court are rarely discussed in constitutional scholarship, but they embody choices that have been made within the system.<sup>8</sup> Some systems, for example, require decisions to be made unanimously – all the judges on the court must agree before the case is resolved – whereas others are satisfied by a majority decision. Given that judges make law, and given that they are empowered to do so under a default rule, it is possible that courts could be the subjects of entrenchment in a similar manner to legislatures. It could be argued, for example, that the courts’ power to strike down statutes as unconstitutional should be exercised only when a supermajority of judges concur.<sup>9</sup> Indeed, the constitutions of

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<sup>7</sup> I discuss this further in N. W. Barber, *Prelude to the Separation of Powers* 60 CAMBRIDGE L. J. 59 (2001) and N. W. Barber, *Self-Defence for Institutions* 72 CAMBRIDGE L. J. 558 (2013)

<sup>8</sup> J. Waldron, *Five to Four: Why Do Bare Majorities Rule on Courts?* 123 YALE L. J. 1626 (2013-2014) and J. Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court* 37 GEORGIA LAW REVIEW 893 (2002-2003).

<sup>9</sup> E. H. Caminker, *Thayerian Deference to Congress and Supreme Court Supermajority Rule: Lessons from the Past* 78 INDIANA LAW JOURNAL 78 (2003).

some American states already contain provisions of this type: in North Dakota four out of five judges must concur to invalidate a statute, whilst in Nebraska five out of seven judges must agree.<sup>10</sup> Although the remainder of this paper will focus on entrenchment as a limit on legislatures, many of the claims it makes could be applied, with a little caution, to other types of constitutional institution.

There are many different ways that the variety of entrenchment rules could be surveyed. This part of the paper will divide entrenchment rules into three groups, each of which is then subject to further subdivision. These three collections of entrenchment rules are clustered around three types of constraint: limitations on the form through which alterations to the law must be expressed; limitations that require the institution to spend extra time considering the change; and limitations that serve to expand the group who must agree to the change. Cross-cutting these categories are three further distinctions: between entrenching rules created by the body subject to the rule, and those imposed on it by another body; between self-embracing entrenching rules and entrenching rules that the institution can alter using the default rules for legal change; and, finally, between entrenching rules that automatically apply in a given area and those that apply only when triggered by another constitutional entity.

(i) *Types of Entrenchment: Form.*

Perhaps the most limited form of entrenchment is the requirement that a measure to alter the law must be expressed in a certain way; the body can alter the law, but must do so through a prescribed form. This may simply require that the new rule explicitly repeals the old - the court will not accept repeal by implication – or the body may have to adopt a prescribed form of words to effect the alteration.

The requirement of express repeal modifies the rule that resolves conflicts between legal instruments. In many systems, when two statutes from the same level of the constitutional hierarchy conflict, precedence is given to the latter.<sup>11</sup> Even if the

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<sup>10</sup> J. DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION*, 131-135 (2006). See also J. Gersen and A. Vermeule, *Chevron as a Voting Rule* 116 *YALE L. J.* 676 (2007).

<sup>11</sup> A. L. YOUNG, *PARLIAMENTARY SOVEREIGNTY AND THE HUMAN RIGHTS ACT* chapter 2 (2008).

more recent act does not expressly repeal the earlier, it is taken to have been impliedly repealed. One, very limited, form of entrenchment removes the operation of implied repeal in an area of law. Now the legislature must expressly repeal the earlier rule: it is not enough for it to expect the courts to give priority to the more recent rule. This form of entrenchment can be seen in some statutes, such as America's Administrative Procedure Act, that exclude the doctrine of implied repeal: these rules can be altered, but they must be altered expressly.<sup>12</sup>

More controversially, in the United Kingdom it is arguable that the European Communities Act 1972 constitutes an entrenching rule of this type.<sup>13</sup> In contrast to the normal default rules of legal change, if Parliament wishes to legislate in conflict with European law it must make this intention express: it must make it clear that the 1972 Act is qualified by the more recent statute. It is not clear whether it is enough for the later statute to make it explicit that it intends to override the 1972 Act or whether the courts would require the repeal of that Act. Whereas the Administrative Procedure Act was a limitation constructed by the legislature, the entrenchment of the European Communities Act is – if it possesses this special status – the creation of judges.<sup>14</sup> The courts have determined that the rule of implied repeal – part of the default rules of legal change – do not apply to that statute.<sup>15</sup>

A second set of entrenching rules demand that the repealing law adopt a specified form of words. Section 2 of the Canadian Bill of Rights 1960 provides that the laws of Canada should be read and applied in conformity to that statute, unless 'it is expressly declared by an Act of the Parliament of Canada that it shall operate

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<sup>12</sup> Administrative Procedure Act, 5 U.S. Code s. 559. See also South Africa's Promotion of Equality and Prevention of Unfair Discrimination Act 2000, s. 5

<sup>13</sup> And maybe the devolution legislation, too: see A. Perry and F. Ahmed, *The Quasi-Entrenchment of Constitutional Statutes* 73 CAMBRIDGE L. J. 514 (2014).

<sup>14</sup> See further, W. N. Eskridge and J. Ferejohn, *Super-statutes* 50 DUKE L. J. 1215 (2001).

<sup>15</sup> *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin); A. L. YOUNG, PARLIAMENTARY SOVEREIGNTY AND THE HUMAN RIGHTS ACT chapter 2 (2009); J. Laws, *Constitutional Statutes* 29 STATUTE LAW REVIEW 1 (2009).

notwithstanding the Canadian Bill of Rights'.<sup>16</sup> Once again, the entrenching rule requires the legislature to make it plain that the more recent statute stands irrespective of the earlier statute,<sup>17</sup> but the example differs from those of the previous paragraphs in that the statute specifies a form of words that the legislature must use to signify its intention.

The distinction between the requirement of express repeal and the requirement that repeal be undertaken through a defined form of words is a fine one, but the choice of the form of words set by the entrenching statute might, sometimes, serve to make it harder for the later body to escape the constraint. The entrenching body can specify the reason for the entrenchment in the form of words that the amending body is required to use when altering the law. The entrenchment rule can serve to 'frame' the later debate around alteration, forcing the body to address the original reasons for the measure, perhaps compelling it to express the alteration in a politically unattractive manner. Though not a form of entrenchment, this framing device is sometimes seen in systems with fixed-term legislatures that permit a vote for an early election. The legislature may be able to act by simple majority, but it is required to express the vote as one of confidence in the government.<sup>18</sup> This makes it politically harder – though not impossible – for a government with a majority in the legislature to manipulate the date of the election.

## (ii) *Types of Entrenchment: Time*

A second form of entrenchment requires that a body spend longer than normal deliberating the amendment of a measure. Entrenchment may simply aim to slow

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<sup>16</sup> Canadian Bill of Rights 1960, s.2. See further L. Sossin, *The Quasi-Revival of the Canadian Bill of Rights and Its Implications for Administrative Law* SUPREME COURT LAW REVIEW (2D) 191 (2004). See also the Victorian Charter of Human Rights and Responsibilities Act 2006, section 31.

<sup>17</sup> For the background to this statute, see D. ERDOS, *DELEGATING RIGHTS PROTECTION: THE RISE OF BILLS OF RIGHTS IN THE WESTMINSTER WORLD*, chapter 4 (2010).

<sup>18</sup> In the United Kingdom the Fixed-Term Parliaments Act 2011, s.2, imposes such a constraint. See also Art. 68 German Basic Law, and the discussion in S. Apel, C. Körber, and T. Wihl, *The Decision of the German Federal Constitutional Court of 25 August 2005 Regarding the Dissolution of the National Parliament* 6 GERMAN LAW JOURNAL 1243 (2005).

down the process of legal change in a given area.<sup>19</sup> It may require that the legislature wait for a certain period between initial consideration of a measure and a final vote on the proposal, either by determining that a set period of time must elapse between the proposal and decision, or the rule could slow deliberation by requiring that the body consult with other institutions before reaching a decision about the alteration of the law.<sup>20</sup>

Entrenching rules that slow the process of legal change may hope to encourage careful deliberation by prolonging the process of debate, but, sometimes, the delay also requires that the deliberation spans an election: one manifestation of a legislature may propose the alteration, but it is a later manifestation that will make the decision to change the law. This allows the electorate to have some involvement in the process: at the very least, unpopular alterations can be debated during the election campaign.<sup>21</sup>

### *(iii) Types of Entrenchment: Voting Units*

A further form of entrenchment expands the group required to vote for the measure.<sup>22</sup> Such expansion can take two forms. It can be internal, either by requiring a supermajority of those entitled to vote or by requiring a specified level of support from sections of that institution, or it can be external, requiring the support of another constitutional body.

#### 1. Internal Expansion of the Voting Unit.

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<sup>19</sup> See generally, R. Albert, *The Structure of Constitutional Amendment Rules* 49 WAKE FOREST L. R. 913 (2014).

<sup>20</sup> Though not an entrenching rule, the Canadian Clarity Act 2000 imposes a requirement of this type.

<sup>21</sup> See, for example, Article 12 of Wisconsin's Constitution. For a complete list of American states that include such provisions, and discussion, see Dinan, note 10 above, 55-57, 310-311. See also V. F. COMELLA, *THE CONSTITUTION OF SPAIN: A CONTEXTUAL ANALYSIS* 55-62 (2013), and the discussion of Nineteenth Century French constitutions in Z. ELKINS, T. GINSBURG, AND J. MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 167-171(2009). On the distinction between amendment and revision see Albert, note 23 above.

<sup>22</sup> A. LIJPHART, *PATTERNS OF DEMOCRACY* 2<sup>ND</sup> ED, 207-219 (2012).

Perhaps the most common form of entrenchment is the supermajority.<sup>23</sup> Whereas most institutions' default rule for making law is simple majority, requiring that over half those voting support the change, a supermajority demands that the change receive a greater level of support. Alternatively, internal entrenchment may empower specific groups within the legislature by requiring the support of designated groups within the chamber: some consociational mechanisms, discussed later in this paper, could be interpreted as forms of entrenchment.<sup>24</sup>

## 2. External Expansion of the Voting Unit.

Entrenchment can also expand the voting unit beyond the body that would, under the default rule, make the decision. Perhaps the most common instance of this is a requirement to hold a referendum before the decision is made. Often, the demand for a referendum protects fundamental features of the constitution, but sometimes the range of rules covered can be surprising: in Australia, for example, it seems that the national flag may only be changed after such a vote.<sup>25</sup> A further form of external expansion draws other constitutional institutions into the decision. In some federal systems the agreement of regional assemblies is needed before the balance between regional and national government is altered.<sup>26</sup>

Some of the instances of entrenchment discussed in the earlier section on delaying rules require reconsideration here. Where the delay is caused by an obligation to consult another body or by the requirement that the decision-making process span an election, these rules will also serve to draw an external group into the decision-making process. They do not expand the voting unit, though, as the groups they include do not have the legal capacity to veto the proposal. Even where the decision crosses an election, there is no requirement – as there would be if a

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<sup>23</sup> M. SCHWARTZBERG, *COUNTING THE MANY: THE ORIGINS AND LIMITS OF THE SUPERMAJORITY RULE* (2014).

<sup>24</sup> A. LIJPHART, *DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION* chapter 2 (1977).

<sup>25</sup> Flags Act 1953, as amended by Flags Amendment Act 1998. In Britain a statute that passes further powers to the European Union may, sometimes, require the support of a referendum: European Union Act 2011, ss. 2, 3.

<sup>26</sup> See, for example, Canada's Constitution Act 1982, s.38.

referendum were needed – that the electorate agree to the change. Indeed, voters who oppose the alteration might, nevertheless, elect legislators who support the change because they agree with other parts of the candidates’ manifesto, or, those who have selected a candidate because they are publically opposed the change might discover, to their annoyance, that the candidate changes her mind after the vote. Nevertheless, delaying rules of this type do provide a formal constitutional mechanism through which parties outside the voting unit can participate in the deliberations surrounding the change and can seek to influence the decision. If the proposed change is at the forefront of debates during the election campaign it is likely that the popular view of its merits will have a significant impact on the deliberation of the legislature and may, effectively, decide the fate of the proposal.

(iv) *Cross-Cutting Distinctions: Self-Imposed Entrenchment*

Most entrenching rules are imposed on the institution by another body; often, they are imposed by a body higher up in the constitutional order. This may be the body that authored the state’s Constitution or, less commonly, the legislature that established the institution – as with the entrenchment rules that constrain the Northern Ireland Assembly. More rarely, the entrenchment rule is imposed on the institution by a body outside of this chain of constitutional hierarchy: the courts have the capacity to impose such constraints on legislatures in some instances, as is the case with the possible emergence of entrenchment in the British system.<sup>27</sup>

Although most instances of entrenchment are imposed on the body from outside, there are a number of instances in which institutions have sought to impose constraints upon themselves. As the composition of institutions changes over time – new legislators are voted in and older legislators step down – self-imposed entrenchment rules are normally attempts by one group of office-holders to impose constraints on their successors.<sup>28</sup> This cross-generational institutional constraint can prove controversial: why should a past set of office-holders place limits on the actions

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<sup>27</sup> Perry and Ahmed, note 13 above.

<sup>28</sup> See S. Holmes, *Constitutions and Constitutionalism* in M. ROSENFELD AND A. SAJÓ, *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 198-200 (2012).

of the present set?<sup>29</sup> Such constraints may be especially problematic if the rules establishing entrenchment do not, themselves, meet the standards of the entrenchment rules they enact: it may, for instance, be hard to defend a rule requiring a supermajority passed by a simple majority.<sup>30</sup>

(iv) *Cross-Cutting Distinctions: Self-Embracing Entrenchment Rules*

Self-imposed entrenchment rules can sometimes be removed using the default process for legal change. It is arguable, for instance, that the Australian Flags Act lacks any special legal protection: whilst the statute requires a referendum before the flag is redrawn, this requirement is, itself, alterable under the full range of the default rules for legal change. Consequently, a later statute altering the flag could impliedly repeal the Flags Act without the need for express repeal.<sup>31</sup> On other occasions, the entrenching statute may be alterable through some of the default processes of legal change but protected from other aspects of those rules: so, as was discussed earlier, the legislature may be able to expressly repeal the entrenching statute, but may not be able to do so by mere implication.

It might be argued that there is little point in imposing a constraint on a body that it is free to remove: why require a special process to change an area of law, but allow that constraint to be removed through the default process of law-making? Roberts and Chemerinsky claim that such rules ought not to be considered forms of entrenchment at all; the constraints imposed are cultural and historical, rather than legal.<sup>32</sup> For reasons that will be discussed in more detail later in this paper, this may

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<sup>29</sup> See J. RUBENFELD, *FREEDOM AND TIME*, chapter 2 (2001).

<sup>30</sup> See the discussion in *McGinty v Western Australia* (1996) 186 CLR 140, per Gummio J, at 297, and T. Roszkowski and J. Goldsworthy, *Symmetric Entrenchment of Manner and Form Requirements* 23 *PUBLIC LAW REVIEW* 216 (2012).

<sup>31</sup> G. WILLIAMS, S. BRENNAN, AND A. LYNCH, *BLACKSHIELD AND WILLIAMS: AUSTRALIAN CONSTITUTIONAL LAW AND THEORY* 6<sup>TH</sup> ED. 758 (2014). See further: G. Carney, *An Overview of Manner and Form in Australia* 5 *QUEENSLAND UNIVERSITY OF TECHNOLOGY LAW JOURNAL* 69, 93-94 (1989).

<sup>32</sup> J. C. Roberts and E. Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule* 91 *CALIFORNIA L. R.* 1773, 1780 (2003). See also R. Albert, *Amending Constitutional Amendment Rules* 13 *INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW* (forthcoming) (2015).

be a little pessimistic. Entrenching rules that can be altered through the normal process of legal change provide, at the very least, an argument that can be raised during the process of deliberation; it requires that the body seeking to alter the entrenching rule overcome the limitation and, in so doing, address the reasons that lay behind the original decision to entrench.

Fear of the alteration of the entrenching rule through the default process of legal change may lead the body to entrench the entrenching rule itself.<sup>33</sup> The Israeli Basic Law: The Knesset is an instrument of this type. Not only does the law entrench key legal elements of the democratic structure of the state, requiring an absolute rather than a simple majority for change, it also entrenches the rule that entrenches these features.<sup>34</sup>

(v) *Cross-Cutting Distinctions: Entrenchment Rules Triggered By Another Body.*

Most entrenchment rules are triggered when a body decides to alter a particular area of law but sometimes another group or institution is empowered to trigger entrenchment. In the American Senate, the filibuster rule enables two-fifths of Senators to impose a requirement that a bill gain the support of three-fifths of the Senate to pass through that institution. Similarly, in the Northern Ireland Assembly thirty members can present a ‘petition of concern’ in response to a bill put before the Assembly; this triggers a requirement that the bill receive cross-community support before enactment.<sup>35</sup>

## **2. When is Entrenchment Desirable?**

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<sup>33</sup> See the discussion in R. Weill, *The New Commonwealth Model of Constitutionalism Notwithstanding: On Judicial Review and Constitution-Making* 62 THE AMERICAN JOURNAL OF COMPARATIVE LAW 127, 141-150 (2014).

<sup>34</sup> R. Weill, *Reconciling Parliamentary Sovereignty and Judicial Review: On the Theoretical and Historical Origins of the Israeli Legislative Override Power* 39 HASTINGS CONSTITUTIONAL LAW QUARTERLY, 457 (2012). In Australia entrenchment rules are self-embracing as a matter of course: C. SAUNDERS, THE CONSTITUTION OF AUSTRALIA, 51 (2011).

<sup>35</sup> Northern Ireland Act 1998, s. 4(5)

Arguments for entrenchment can be divided into two groups: the general and the particular. General arguments for entrenchment are those that apply to any set of rules, and the two most important turn on stability and identity. Entrenchment can make an area of law more stable by making it harder to change. It can also indicate areas of law that the state regards as essential to its identity: entrenchment acts as a signal of the importance of the rules. In these instances, the aim of entrenchment is simply to make the law harder to change, using this additional difficulty to enhance the stability of the law or to indicate the special importance of the rules protected. Particular arguments for entrenchment, in contrast, rest on the claim that the default rule for legal change is, in a particular area, problematic, and by altering the process by which the law is changed this problem can be cured or mitigated. The objective of particular arguments for entrenchment is the modification of the normal process of legal change to remedy a problem with the default rules. In so doing, legal change is made harder, but the imposition of this additional difficulty is not the point of the entrenching rule but rather a side-effect of the use of entrenchment to remedy a deficiency found in the operation of the default rules. For instance, an entrenchment rule that sought to protect the position of regional legislatures by requiring their consent to laws that alter their jurisdiction would provide a clear example of this. There is a reason for entrenchment (protection of regional legislatures from decisions made at the national level) that connects to the scope of rules that are entrenched (those setting the jurisdiction of the legislatures) and to the type of entrenchment adopted (their agreement is required before their jurisdiction can be altered).

Where valid, particular arguments for entrenchment are more illuminating than general arguments for entrenchment. They explain why the device of entrenchment is attractive in a situation, and, also, provide some guidance on the form that the entrenchment should take and on its reach. This does not mean that general arguments invariably fail; it could be that in some instances the application of a general argument in a specific situation is sufficient to justify entrenchment, and, sometimes, general arguments for entrenchment will supplement and reinforce particular arguments.

(i) *A General Argument for Entrenchment: Stability.*

Stability is a desirable – and, to a degree, a necessary – quality of a legal order. One of the defining objectives of law is that it guides conduct, and, all else being equal, stable law guides conduct more successfully than unstable law. Though the stability of a law does not speak directly to its moral value – an evil law could be as stable as a good law – when stability is found within the context of a functioning legal order it does constitute, in Joseph Raz’s phrase, a ‘negative virtue’.<sup>36</sup> It allows people to predict how power, normally state power, will be exercised over them; when there is a functioning legal order even the worst sort of state sees its range of action constrained, and some freedom, however minimal, is left to its people.

Of course, most real-world legal orders are a mix of the good and bad, and then the merits of stability reach beyond the minimalist account presented in the last paragraph. Now the law helps people to live valuable lives, creating possibilities for their interaction. Not only can people predict how the state will exercise its coercive power over them, they can rely on the state to help them pursue projects and collaborations. The capacity to form legally binding agreements is created: contracts can be made and are enforced. Groups can form institutions outside of the state that are legally recognised and that have legal powers: companies, charities, unions, and marriages are given legal identities. Instability in the law can threaten the law’s capacity to play this constructive role.

There is, then, a general argument for entrenchment: any type of entrenchment makes legal rules harder to change and so enhances their legal stability and can raise confidence in the legal system. Eric Posner and Adrian Vermeule have recently provided a focused defence of a particular type of entrenchment that has stability at its core.<sup>37</sup> Their paper focuses on self-entrenchment, those instances in which a body places limits on its future incarnations. Their broadest point is that the legislature should be accorded the power to decide the balance between flexibility and stability; like other forms of temporal limits on statutes – sunset clauses, commencement dates, and the like – entrenchment can serve to regulate the duration of a law, allowing the

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<sup>36</sup> J. Raz, *The Rule of Law and Its Virtue* in J. RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* (1979), echoing, perhaps, the view of A. V. Dicey: see N. W. Barber, *Must Legalistic Conceptions of the Rule of Law Have a Social Dimension?* 17 *RATIO JURIS* 474 (2004)

<sup>37</sup> Note 3 above.

legislature to give special protection to laws which – the legislature judges - will benefit from greater stability and predictability of application. They cite a number of areas of law in which the legislature might choose to exercise this power. For instance, a legislature might choose to guarantee contracts entered into by the executive, perhaps by deciding that such contracts can only be repudiated by the state after a super-majority vote.

As Posner and Vermeule show, entrenchment can bring valuable stability, and is a legal device that a reasonable legislature might use to resolve some of the problems faced by its community which are generated by the changeability of law. On Posner and Vermeule's account, when used correctly self-entrenchment serves to remind the subsequent legislature of the reasons it has for adhering to its earlier decision. The use of entrenchment as a form of *aide-mémoire* will be discussed later in this paper.

Before leaving the subject of stability as an argument for entrenchment, a final qualification needs to be made. The stability brought by entrenchment is *legal* stability: by definition, entrenchment makes it harder to change the law. It need not follow that entrenchment produces *political* stability, indeed, it may be that entrenchment increases the political volatility of an issue by making it harder for the law to be altered through the normal processes of legal change.<sup>38</sup> Cass Sunstein's claim<sup>39</sup> that entrenchment can facilitate the workings of a constitution by removing a divisive issue from political debate, allowing law-makers to concentrate on other areas in which consensus can be reached, may sometimes be correct. But one of the examples he gives – the right to abortion in American law – shows how contentious an issue can remain, even if entrenchment makes it legally hard to re-open the issue. The law surrounding abortion in America may be relatively stable – the rules are hard to alter – but the politics surrounding abortion are febrile, and entrenchment may have played a part in raising the temperature of the debate. Legal stability may have been bought at the price of political instability.

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<sup>38</sup> S. Holmes, 'Gag Rules or the Politics of Omission' IN J ELSTER AND R SLAGSTAD (EDS), CONSTITUTIONALISM AND DEMOCRACY, 19 (1993)

<sup>39</sup> C. Sunstein, *Constitutionalism and Secession* 58 UNIVERSITY OF CHICAGO L. R 633 (1991).

(ii) *A General Argument for Entrenchment: Identity*

A second, and common, argument for entrenchment comes from the identity of the state. It is sometimes claimed that certain rules are so important, so essential to constitutional identity, their change would challenge the very continuation of the state. This might explain why, for some, entrenchment determines the content of the constitution: these are the rules that are fundamental to the identity of the state.<sup>40</sup> It has been argued that constitutional devices may modify the constitution, but they should not be permitted to destroy it: some core aspects of the state's constitution are, or should be, beyond the reach of constitutional change.<sup>41</sup> Sometimes states put those rules they regard as essential to their identity beyond legal change<sup>42</sup> – and these unalterable rules fall outside of the scope of this paper – but sometimes these rules are protected by a form of entrenchment: they are made harder to alter, but change remains possible.

Though popular, the argument for entrenchment from identity is weak. The argument embodies a doubtful descriptive claim coupled with a problematic normative assertion. The doubtful descriptive claim relates to the identity of the state. When discussing the identity and continuity of the state there is a tendency to seek the single thing, the golden thread, that confers identity on the state and the preservation of which establishes the continuity of that institution. As I have argued elsewhere, this is an overly reductionist account of state identity. The state is made up of a number of elements – territory, members, institutions, and the rules that constitute and connect them.<sup>43</sup> Rather than a golden thread, the identity and continuity of the state should be imagined as a rope, in which a great many threads are entwined. Even radical change to the constitution, such as the replacement of one written Constitution

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<sup>40</sup> L. Alexander, *Constitutionalism* in T. CHRISTIANO AND J. CHRISTMAN, CONTEMPORARY DEBATES IN POLITICAL PHILOSOPHY (2009).

<sup>41</sup> See the discussion in G. JACOBSON, CONSTITUTIONAL IDENTITY, chapter 2 (2010); Schwartzberg, note 1 above, 169-184; Albert, note 6 above, 678-685.

<sup>42</sup> On which see Albert, note 1 above.

<sup>43</sup> I discuss this further in N. W. BARBER, THE CONSTITUTIONAL STATE, chapter 8.

with a wholly new document, does not necessarily break the continuity of the state: France, for example, has worked its way through many constitutions, but is still the same polity.

The normative basis of the argument from identity also merits examination. Even if it is accepted that the alteration of the rule would amount to an alteration of the identity of the state, or the effective destruction of the constitution, it is far from clear why this should, in itself, be considered a bad thing. There is no inherent value in constitutional continuity: that a state has this or that necessary characteristic does not, by itself, render the characteristic valuable. If the objection to an alteration to the constitutional order is, simply, that it amounts to a radical change this is not, in itself, an argument against the shift.

These flawed arguments from identity often conceal better, substantive, arguments. They may, perhaps, conceal a variant of the argument from stability discussed in the previous section; a variant grounded in the value of the particular features of the constitution that entrenchment seeks to immunize against change. Sometimes those who argue that constitutional amendments should not be permitted to alter, for example, the federal or the democratic structure of the state are really arguing that these features are intrinsically valuable, and should be preserved for this reason.

There is a more modest version of the argument from identity that might occasionally justify entrenchment. Sometimes entrenchment acts as a signal of importance, a public declaration that the state regards a rule as being of especial value or significance.<sup>44</sup> In a community that regards entrenchment in this way, entrenchment can be used as a device to pick out certain features of the constitution as having special significance. It can have an educative function, bringing forward these key features, and, in so doing, can help members of the state understand and identify with the constitution.

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<sup>44</sup> Albert, note 1 above, 685-693; C. Sunstein, *On the Expressive Function of Law* 144 UNIVERSITY OF PENNSYLVANIA L. R. 2021 (1996).

(iii) *Particular Arguments for Entrenchment: Reminding the Body of Reasons Relevant to the Alteration of the Law*

The last section concluded with the observation that there may sometimes be an educative value in entrenchment; a similar, narrower, argument for entrenchment turns on its capacity to act as an *aide-mémoire*, reminding the institution of the reasons relating to the laws protected by the entrenching rule.<sup>45</sup>

Some entrenchment rules allow the legislature to alter the protected area of law relatively easily, but require it to acknowledge the reasons for entrenchment. Entrenchment rules that specify a required form for the alteration of the law often play this function. For instance, in the United Kingdom, a legislature that wished to pass a statute contrary to European Law could do so, but must make it explicit, whilst in Canada, the legislature can legislate contrary to the Bill of Rights, but only if it declares its willingness for the law to operate notwithstanding that document. In each of these examples the entrenchment rule appears relatively weak – it can easily be satisfied – but in each case the legislature is compelled to address the reason animating the original entrenchment. It could be that being forced to address these issues will, by itself, deter the legislature from acting; it is reminded of reasons bearing on the legislative decision it might otherwise have forgotten.

The use of entrenchment as an *aide-mémoire* links most cleanly to formal types of entrenchment. Here the reason for entrenchment (reminding the legislature of a relevant consideration) connects to the rules that are entrenched (those where that consideration is relevant) and to the manner of entrenchment (the legislature is compelled to address this consideration). Given that this type of entrenchment serves only to present the law-maker with reasons that – the entrenching body believes – are relevant to the decision, it is easy to justify this set of entrenchment rules. If the original act of entrenchment was a mistake, or if the reasons it sought to bring to the attention of the law-making body are no longer relevant, the constraint the entrenching statute places on the legislature will be limited: the legislature can

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<sup>45</sup> See also R. Albert, *The Expressive Function of Constitutional Amendment Rules* 59 MCGILL LAW JOURNAL, 225, 229 (2013); G. Winterton, *Can the Commonwealth Parliament Enact "Manner and Form" Legislation?* 11 FEDERAL LAW REVIEW 168, 170-172 (1980).

acknowledge the reasons animating the entrenching statute, but, having acknowledged these reasons, continue to alter the law.

The capacity of entrenchment rules to compel, or induce, legislatures to reflect on considerations that they might otherwise ignore, also helps explain the potential value of entrenchment rules that can be removed using the default process of legal change. Some writers have doubted that these rules have any utility: they are too easy to override. But a legislature that is considering overturning the entrenchment rule is led to consider the reasons for the original decision to entrench: not only should it consider whether the rules protected by the entrenchment rules should be changed, it should also consider the further, and distinct, question of whether the entrenchment rule itself should be altered.

(iv) *Particular Arguments for Entrenchment: Protecting Groups within the Legislature*

Most of the time legislative decisions turn on simple majority votes: if more than half of those voting support a measure, the measure is successful. The losing minority rarely has reason to complain about their defeat under the default rule; after all, if we give equal weight to the worth of all legislators, we should ascribe equal significance to their votes, and a vote against a measure should count for no more than a vote that supports it. The measure adopted may be foolish or unwise, but it is hard to argue it has been adopted unfairly. The argument from the equal status of legislators is normally sufficient to defend a default majority rule. But there are some situations in which the constitutional role of the legislature may require a departure from this rule, and require a form of entrenchment.

The job of a legislature is not simply to vote on legislation; it should also deliberate prior to its vote. This deliberation should be directed towards the common good, identifying ends that benefit the community, and determining a rational scheme for pursuing these goals.<sup>46</sup> In a well-functioning legislature all of the representatives should be included in this deliberative aspect of the legislative function – even those

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<sup>46</sup> R. EKINS, *THE NATURE OF LEGISLATIVE INTENT*, chapter 5 (2012).

who end up on the losing side. They can challenge and refine the legislature's conception of the common good, and debate the means selected by the legislature to pursue those ends. The minority also have a representative role to play: making sure that the views and interests of their constituents are heard in the Chamber. In short, it would be a mistake to think that the justification for the default rule for legislative decision-making also justifies the exclusion of the losing minority from legislative deliberation.

There are at least two groups of situations that can arise in which the tasks of a legislature may require a departure from the default rule to protect the losing minority group and provide a potential justification for a form of entrenchment.

First, in some polities the parties within the legislature are not oriented towards the common good of the community, but rather towards the good of a portion of that community. In such societies politics is sectarian rather than ideological, with the parties fighting to protect and advance the interests of their groups. This type of politics is sometimes found in societies that are characterised by a deep ethnic or religious divide. Strict adherence to a simple majority default rule in these instances is likely to result in one sectarian group using the power of the legislature for its exclusive advantage or, worse still, to the disadvantage of the other group.

Secondly, where the majority group of representatives is able to push through its policies it may come to undervalue the contribution of minority representatives to the deliberative aspect of legislating. This pathology will often accompany the first – where a group of legislators fails to value the well-being of a portion of the citizenry it will also fail to respect the contributions of legislators who are drawn from that group – but it can arise independently. In a polity that is characterised by ideological disagreement – in which the legislators agree that legislation should be oriented towards the common good, but disagree over the content of that good – the majority group of representatives may show insufficient consideration towards their opponents. Their capacity to win votes under the default rule without the support of some legislators may lead them to undervalue the contributions of those legislators to debates, perhaps manipulating or shaping procedural rules to exclude them from the deliberative process.

In each of these instances entrenchment can play a role in mitigating the deficiencies of the legislative process. By requiring a supermajority for certain decisions, an entrenching rule can protect the minority group, either by preventing the majority from overriding the minority or, more subtly, by requiring the majority to negotiate with the minority before the law can be changed.

(v) *Particular Arguments for Entrenchment: Protecting Regions.*

In the previous section the entrenchment rule had the effect of widening the group within the legislature who needed to reach agreement before a decision could be reached. These rules could serve to protect minorities in the legislature. A further, analogous, argument for entrenchment turns on its capacity to protect regions from decisions made at the national level by including, in some way, these regions within the decision to change rules relating to the constitutional balance between the national level of government and the regions. This type of entrenchment expands the voting unit outwards: bodies outside the national legislature are given a say in the decision to alter the law.

(vi) *Particular Arguments for Entrenchment: Protecting Institutions in the Constitution.*

The previous sections considered the role that entrenchment can play in protecting minority groups within the legislature and regions within the state. One of the ways that it achieved this was by incorporating these bodies within the decision-making process. A similar device could be used to protect other institutions within the constitution: in principle, an entrenchment rule could incorporate any institution into the decision. Even the courts could be included in the process: perhaps the agreement of the Supreme Court, or of the majority of judges who sit on that body, should be required before the legislature passes a law that restricts the power of that institution. The institution that is most commonly protected by entrenchment, though, is the citizenry: the broad mass of the electorate who vote for the legislature and constitute the political community that the legislature serves. The citizenry can be incorporated into the legislative decision by requiring the support of the electorate

through a referendum before the change in the law is permitted. Where the proposed change radically alters the democratic structures of the state, there is a strong argument that the alterations should be submitted to the people; their role in the constitutional order is being changed, and they should be directly involved in this decision. A form of this argument might explain the popularity of referendum requirements in the national constitutions of countries that are members of the European Union, a number of which require a referendum before powers are transferred from the national to the European level.<sup>47</sup>

(vii) *Particular Arguments for Entrenchment: Guarding Against Moral Panics.*

A common argument for constraining legislatures, often heard in debates over bills of rights, warns of the dangers of legislation passed during a moral panic.<sup>48</sup> Moral panics are periods of temporary, widespread, irrationality, during which a polity forgets the fundamental moral beliefs on which its constitution rests, and rushes to make changes that it will later regret. After a terrorist attack, for example, a state might forget the importance of due process, or its opposition to torture. Entrenchment rules can help protect against moral panics in two ways: by forcing the law-maker to address the earlier constitutional commitments that are being overturned during the panic, and, secondly, by slowing the process of legal change.

The capacity of entrenchment to act as an *aide-mémoire* was discussed earlier in this paper, but it is worth noting that entrenching rules requiring a particular form may prove especially useful as a guard against moral panics. It is of the nature of moral panics that they are moments of forgetting: the deeper commitments of the polity are overlooked in a time of crisis, an omission that is later regretted. Entrenchment rules that require legislation that deviates from a Bill of Rights to make that deviation explicit, at least compel the legislature to address the gap between the considered values of the polity and the new legislation.

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<sup>47</sup> See M. Shu, *Referendums and the Political Constitution of the EU* 14 EUROPEAN LAW JOURNAL 423 (2008).

<sup>48</sup> The phrase comes from Stanley Cohen: S. COHEN, *FOLK DEVILS AND MORAL PANICS* (2011).

A stronger defence against moral panics slows the process by which the legislature can alter the law. Moral panics are – by definition – transitory. Compelling a legislature to consider a change to the law over an extended period increases the chances that the panic will subside – and, if the opinion of the legislature remains consistent over this time, makes it less likely that the decision to alter the law was caused by a panic. Many constitutions use entrenchment to slow down the process of change; these entrenchment rules are often broad and it may be hard to justify the whole of their reach, but they may have a valuable role to play in guarding against temporary fluctuations in opinion.

### **3. What is Wrong With Entrenchment?**

The default rules that govern legal change should have been chosen for good reason; those determining the law-making power of the institution should have selected rules that enable the body to fulfil its constitutional role within the state, rules that neither make the process of legal change too hard nor too easy. There is a wide range of default rules that the authors of the constitution might adopt, but – having adopted a particular set of rules – departure from them needs to be justified. Consequently, entrenching rules always require justification: because they add an extra burden to the process of legal change specified by the default rules, that extra burden, to be defensible, must have been imposed for good reason. The onus of argument lies on those advocating entrenchment to explain why it is desirable, rather than on those who oppose it.

The presumption against entrenchment requires those who argue for the rule to demonstrate its value. But once it has been shown that there is some merit to the rule, the arguments against entrenchment must also be assessed: the good reasons for entrenching may be outweighed by reasons against. These arguments will, of course, depend very much on the particular context and nature of the proposed rule, but there are two broad groups of arguments that ordinarily weigh against entrenchment. First, that entrenchment rules make it excessively hard to change the law, making it difficult for institutions to respond to the needs and wishes of the citizenry, and making it harder to hold law-makers accountable for their decisions. Secondly, entrenchment

rules may create friction between institutions within the constitution, either by enabling one institution to limit another or by encouraging institutions to attempt to circumvent these limits.

(i) *Entrenchment Leading to Inflexibility in the Law*

A defining feature of an entrenchment rule is that it makes some parts of the law harder to change than would otherwise be the case. As Jon Elster has observed, the usual purpose of constitutional rules is to bind others in the future: it is one generation seeking to place limits on its successors.<sup>49</sup> This can present a number of dangers. Most plainly, it may inhibit the capacity of law-makers to respond to changes in their community: a rule that seemed valuable and sensible at one point in time may seem misguided later. Or it could be that something that once seemed important comes to be regarded as an unnecessary constraint on the evolution of the state. The special protection given to the Australian flag – effectively, requiring that it continue to include the Union Jack – might come to be seen as an attempt by a past generation to constrain the present Australian citizenry. By making legal change harder, entrenchment can raise concerns that go beyond the problems caused by inflexibility. Making it harder to change the law can also inhibit democratic government and blur accountability for political decisions. Democracy requires, in part, that a legislature be effective, that it be capable of enacting laws. By making it harder to change the law entrenchment may sometimes run against democracy, preventing the legislature from pursuing the wishes and interests of its electorate.<sup>50</sup>

More specifically, entrenchment may make it harder to apportion responsibility for decisions within the constitutional structures of the state. Where the entrenching rule was drawn up some time ago, it may be impossible to hold the authors of the rule accountable for the limitations it imposes on contemporary institutions. Where an institution places constraints upon itself, should a future manifestation of that institution be regarded as responsible for these limitations? The Senate filibuster rule, discussed later in this paper, is a rule created by the Senate

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<sup>49</sup> J. ELSTER, *ULYSSES UNBOUND*, 92 (2002).

<sup>50</sup> Albert, note 1 above, 676-679.

which limits its capacity to legislate. It could either be argued that the Senate is responsible for its own rules – including those rules that constrain it – or it could be argued that the contemporary Senate cannot be held responsible for the limitations chosen by their previous incarnations.

(ii) *Creating Tension Between Institutions.*

Entrenchment can create tension between institutions in a number of ways. First, and most obviously, entrenchment often requires the involvement of another body – normally the courts – to make it effective. There are a range of questions that the courts may be asked, or required, to answer. The most basic relate to the justiciability of the entrenchment rule: the court must decide whether this is the type of rule that falls within its jurisdiction to apply and interpret. If it is within jurisdiction, the court may then be required to interpret the rule and adjudicate on its breach.<sup>51</sup> Finally, the court must decide on the consequences of the breach: does it render the apparently enacted statute invalid, or should the court more cautiously confine itself to declaring that the statute was enacted unconstitutionally? Consideration of the role of the court in entrenchment underlines its potential to generate tensions between institutions.<sup>52</sup> The body subject to entrenchment may have a different answer to these questions than that given by the court. The court may be compelled to pick sides in a constitutional dispute: there may be rival understandings of the entrenchment rule within the legislature, or, perhaps, the court must choose between the arguments of the national legislature and other constitutional institutions.

The previous paragraph considered the tension that might be caused when the court seeks to uphold the entrenchment rule. A further, and less obvious, source of tension may arise when the court seeks to, or is encouraged to, circumvent the entrenchment rule. As Eule has argued, when entrenchment makes legal change very difficult, the court may step in to navigate around the rule.<sup>53</sup> This could be regarded

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<sup>51</sup> Schwartzberg, note 2 above, 184-189.

<sup>52</sup> As an example of this, see J. Goldsworthy, *Trethowan's Case* in J. GOLDSWORTHY, *PARLIAMENTARY SOVEREIGNTY* (2010).

<sup>53</sup> J. N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity* 12 *LAW AND SOCIAL ENQUIRY* 381, 387-388 (1987).

as a power-grab, an ambitious court stepping into the space left by the legislature, but it could also be an instance in which necessity compels judicial intervention. If the legislature is unable to respond to changing social needs because of entrenchment, the court may be required to supplement the omission. Such innovation, whether necessary or not, can come at a cost. The fairy-tale<sup>54</sup> that the courts invariably declare, rather than make, the law may be one of the sources of the courts' perceived legitimacy: people may accept the decisions of the courts because they think that judges apply pre-existing law, determined by the legislature. Radical decisions, or decisions that are contested by other constitutional institutions, can serve to expose the fairy-tale, and weaken the authority of the court.

A final danger brought by some forms of entrenchment is the risk of tit-for-tat behaviour. Where an institution starts to engage in self-entrenchment, placing limits on its future incarnations, there is a chance that entrenchment will become a tool of party politics. When one political group controls the legislature it may seek to entrench its political objectives to prevent its decisions being overturned after an election.<sup>55</sup> When control of the chamber shifts, the incoming party may have little hesitation in using the same device against its rivals. Cass Sunstein writes that a benefit of entrenchment is that it takes an issue off of the political agenda, the issue being determinatively settled by the rule;<sup>56</sup> but whilst it is tempting for a party to seek to remove the issues it cares about from the realm of political debate, it then risks its opponent using the same device in return. This fear may explain why self-imposed entrenchment rules – those that bind the institution enacting the rule – are rare, and self-embracing entrenchment rules – those in which the entrenchment rule is, itself, entrenched – rarer still.

#### **4. Responding to Entrenchment**

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<sup>54</sup> Lord Reid, *The Judge as Law-Maker* 12 JOURNAL OF THE SOCIETY OF PUBLIC TEACHERS OF LAW (N.S.) 22 (1972).

<sup>55</sup> See the Australian experience: Blackshield and Williams, note 31 above, 737.

<sup>56</sup> C. Sunstein, *Constitutionalism and Secession* 58 UNIVERSITY OF CHICAGO L. R 633, 639-640 (1991).

This paper has sought to connect types of entrenchment rule with the reasons why a constitution might wish to make use of entrenchment. Rather than seeking to argue that entrenchment is either invariably desirable or undesirable, it has sought to show that the attractions of entrenchment depend, in large part, on the particular type of rule used and the context of its use. Entrenchment is more attractive in some situations than in others, and, in these situations, some types of entrenching rule will be more appropriate than others. These considerations should guide both the bodies considering adopting an entrenchment rule and those who apply and interpret the rule. Using the arguments presented in this paper, three examples of entrenchment will be considered in some detail. The first two examples – drawn from the Northern Ireland consociational settlement and the European Protocol on Subsidiarity – are cases in which there is a strong connection between the reasons for entrenchment, the type of entrenchment adopted, and the area of law entrenched. The third example – the Senate’s filibuster rule – is more difficult: the rule appears to be too broad, and the arguments presented in this paper push for a narrow interpretation of the rule.

(i) *The Northern Ireland Assembly and Consociationalism*

Consociational systems use constitutional rules to encourage cross-community decision-making:<sup>57</sup> rather than allowing a bare majority in the legislature to control that institution, power must be shared between groups within the chamber. Constitutional devices of this kind are most attractive in societies that are deeply ethnically or culturally divided, where politics may be sectarian – with representatives trying to achieve the best possible deal for their ethnic groups – rather than ideological – in which representatives debate the common good, and the means by which this good can be achieved.

In the Northern Ireland Assembly members are required to register a designation of identity: nationalist, unionist, or other.<sup>58</sup> The default rule of the

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<sup>57</sup> Lipjhart, note 24 above and J. Coakley, *The Challenge of Consociation in Northern Ireland* 68 PARLIAMENTARY AFFAIRS 473 (2015).

<sup>58</sup> C. McCrudden, *Northern Ireland and the British Constitution* in J. JOWELL AND D. OLIVER, *THE CHANGING CONSTITUTION*, 6<sup>TH</sup> ED. (2007). On the experience of consociationalism in Northern Ireland, see J. Nagle, *From Secessionist Mobilization to Sub-State Nationalism? Assessing the Impact of*

Northern Ireland Assembly is simple majority, but there are two categories of decisions that depart from this rule, situations in which legal change requires ‘cross-community support’. In these instances, the vote must either consist of a majority of those voting in both the nationalist and unionist groups, or a supermajority (60 per cent) of those voting, including at least 40 per cent of those voting in the nationalist and unionist groups.<sup>59</sup> First, some the standing orders that regulate the operation of the Northern Ireland Assembly can only be altered with cross-community consent.<sup>60</sup> These standing orders include rules that govern the election of a Speaker, the process by which representatives are selected to contribute to debate, and the questioning of members of the Northern Ireland Executive.<sup>61</sup> Secondly, if thirty representatives (out of a total group of 108 members) sign a ‘petition of concern’, any piece of proposed legislation will then require cross-community support; in the language of this paper, the petition triggers the entrenchment rule.<sup>62</sup>

The entrenching of the procedural rules of the Assembly helps ensure that one group cannot exclude the other from participation in the legislature. There is a tight connection between each of our three aspects of entrenchment. Here the reason (ensuring both groups are able to participate in debate and scrutiny) connects to the rules that are entrenched (the procedural rules of the Northern Ireland Assembly) and the manner of entrenchment (a substantial portion of each group must agree to a change in these procedures).

The second entrenchment rule can apply to any area of legal change if thirty members or more of the Assembly choose to invoke it.<sup>63</sup> This capacity to trigger entrenchment compels negotiations between the Unionist and Nationalist groups in

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*Consociationalism and Devolution on Irish Nationalism in Northern Ireland* 23 REGIONAL AND FEDERAL STUDIES 461 (2013).

<sup>59</sup> Northern Ireland Act 1998, s. 4(5)

<sup>60</sup> Section 41.

<sup>61</sup> Northern Ireland Act 1998, s. 41

<sup>62</sup> Northern Ireland Act 1998, s. 42

<sup>63</sup> On the functioning of this process, see C. McCrudden, J. McGarry, B. O’Leary and A. Schwartz, *Why Northern Ireland’s Institutions Need Stability* GOVERNMENT AND OPPOSITION (Available on CJO 2014 doi:10.1017/gov.2014.28)

the Assembly; before either group can enact a statute it must obtain the support of the other group. The partiality that is characteristic of sectarian politics is mitigated by a requirement that power be shared. Once again, this can be broken down into the reason for entrenchment, the type of entrenchment adopted, and the rules that are entrenched. The reason for entrenchment is the need to prevent one group from using the default rule of legal change to disadvantage the other group, and as this could, potentially, occur in any area of legislative activity, rather than picking out a specific set of laws for protection the entrenching rule allows either group to trigger the expansion of the voting unit: after a petition of concern is presented, the law can no longer be enacted by a simple majority.

(ii) *The Protocol on Subsidiarity*

The Protocol on Subsidiarity provides an example of an entrenchment rule that seeks to protect regions within a larger political unit. National parliaments are able to trigger the entrenchment of rules that they believe encroach on areas of law that, under the principle of subsidiarity, should be left within their jurisdiction.<sup>64</sup> The rules which regulate the operation of the trigger are – characteristically – complicated, but, to simplify, if more than one third of national parliaments issue a ‘reasoned opinion’ arguing that a measure runs contrary to subsidiarity, the Commission must review the legislative proposal. If the Commission decides to continue with the proposal, it must explain why it believes the measure is compatible with subsidiarity. Although this mechanism is of limited effectiveness,<sup>65</sup> it has been successfully utilized by national parliaments.<sup>66</sup>

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<sup>64</sup> For the background to this provision, see A. Groen and T. Christiansen, *National Parliaments in the European Union: Conceptual Choices in the EU’s Constitutional Debate* in C. Heffler, C. Neuhold and O. Rozenberg eds., *PALGRAVE HANDBOOK ON NATIONAL PARLIAMENTS AND THE EUROPEAN UNION* (2015).

<sup>65</sup> On which, see N. W. Barber, *The Limited Modesty of Subsidiarity* 11 *EUROPEAN LAW JOURNAL* 308 (2005); I. Cooper, *A Virtual Third Chamber For the European Union? National Parliaments After the Treaty of Lisbon* 35 *WEST EUROPEAN POLITICS* 441 (2012).

<sup>66</sup> F. Fabbrini and K. Granat, “Yellow Card, But No Foul”: *The Role of the National Parliaments Under the Subsidiarity Protocol and the Commission Proposal for an EU Regulation on the Right to Strike* 50 *COMMON MARKET LAW REVIEW* 115 (2013).

Superficially, the Protocol resembles the example drawn from the Northern Ireland Assembly, where those affected by a measure were given a capacity to expand the voting unit when they believed their interests were affected by a proposal. However, in this instance the bodies empowered to trigger entrenchment, the national parliaments, are outside of the law-making process and remain outside of that process; the entrenching rule does not enable them to veto the proposal. Instead, the measure activates a variety of entrenchment through form; to continue with the legislation the Commission must publically reconcile its proposal with the principle of subsidiarity.

Once again, the connection between the three elements of entrenchment is strong in this example. The reason for entrenchment (protecting the jurisdiction of national parliaments from European legislation) ties to the manner of entrenchment (allowing national parliaments to trigger reconsideration of the subsidiarity principle) and the area of law potentially entrenched (those legal rules currently within the jurisdiction of national parliaments which they, the national parliaments, judge encompassed by the subsidiarity principle). The modesty of this entrenchment makes it easier to defend than a rule that empowered the striking down of a legislative proposal; it protects national parliaments by enabling them to remind the Commission of the value of subsidiarity. If national parliaments misuse this power, if they force the Commission to reconsider a measure that is plainly compatible with subsidiarity, the Commission will be able to publically justify its proposal and continue with the legislation.

### (iii) *The Senate Filibuster Rule*

The Senate filibuster rule has taken various forms over the years, but presently requires a majority of three-fifths of those competent to vote to close debate on a measure.<sup>67</sup> The Senate's decisions on legislation are normally made through simple majority, and the filibuster rule effectively enables any group of more than two-fifths of Senators to transform the voting rule from simple majority to supermajority. The text of the filibuster rule, Rule XXII(2), gives the impression that it is an example of a

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<sup>67</sup> On the origins of the filibuster rule, see E. Bondurant, *The Senate Filibuster: The Politics of Obstruction* 48 HARVARD JOURNAL ON LEGISLATION 447, 470-476 (2011).

self-embracing entrenchment rule.<sup>68</sup> It seems that not only is a supermajority required to close the debate, a supermajority is also required to alter the rule requiring a supermajority. It is likely, though, that in this respect the text of the filibuster rule does not constrain the Senate.<sup>69</sup> Roberts and Chemerinsky discuss an incident in 1975 in which it was accepted by the Presiding Officer that the filibuster rule could be altered by a simple majority, irrespective of the apparent restrictions on change within the rule itself,<sup>70</sup> and Lisa Holmes has documented a successful attempt by Democrats in 2013 to remove the possibility of the filibuster over certain judicial appointments.<sup>71</sup>

Two arguments could be drawn from the preceding discussion to support the filibuster rule. First, it could be that the rule encourages negotiation between the parties in the Senate: like Northern Ireland, the rule compels compromise between groups, spreading the benefit of legislation. Second, it could be that the rule ensures that the minority party in the Senate is included within the deliberative element of the legislative process: if its views are not considered, it can threaten to use the filibuster rule. If these are the reasons for the filibuster rule, it seems that entrenchment is excessively wide: it gives a minority in the legislature too much protection. Unlike Northern Ireland, politics in the Senate is – broadly speaking – ideological; there is agreement that decisions of the Senate should be in the interests of the whole of the American people, but disagreement about the laws that will advance those interests. There is no reason to suppose that any particular group in America will be systematically disadvantaged as a result of this form of politics (though there might be groups who are systematically disadvantaged for other reasons).<sup>72</sup> If, in contrast, the point of the rule is to protect the participation of the minority party, perhaps only the rules relating to relevant aspects of Senate procedure ought to be entrenched – such as the rules regulating the appointment of Senators to committees, the processes by

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<sup>68</sup> Roberts and Chemerinsky, note 31 above, 1779-1781.

<sup>69</sup> A. R. Amar, *Lex Majoris Partis: How the Senate Can End the Filibuster On Any Day By Simple Majority Rule* 63 DUKE LAW JOURNAL 1483 (2014).

<sup>70</sup> *Ibid.*, 1780-1781, though see Bondurant, note 66 above, 476-477.

<sup>71</sup> L. Holmes, 'Going Nuclear' Over Appointments: The Causes and Consequences of Filibuster Reform APSA 2014 Annual Meeting Paper: available at SSRN: <http://ssrn.com/abstract=2451585>

<sup>72</sup> Bondurant, note 66 above, 483-484.

which Senators are invited to speak or to proposed legislation, and the disciplining of legislators. Entrenching these rules would help prevent the manipulation of these rules by the majority party – but a general power to trigger the entrenchment of any area of law may be too sweeping to justify.

However, if the Senate has the power to alter the filibuster rule by simple majority – if the apparent attempt at self-embracing entrenchment has failed - the rule becomes easier to defend.<sup>73</sup> It then stands as a reminder of the importance of involving the minority in the legislative process: the Senate can overturn the rule, but must explain why this protection should be removed from the minority. Faced with an intransigent minority, the majority may consider forcing through the legislation, but the presence of the entrenchment rule acts as an extra hurdle that must be jumped. Not only does the majority need to decide whether the bill merits becoming law, they must also decide whether the advantages of abandoning the filibuster rule justify the costs of breaking the entrenchment. And at this point, of course, a sensible majority party will remember that politics is a changeable business: the party chaffing at the constraint of the filibuster rule today may be its beneficiary tomorrow.<sup>74</sup>

## 5. Conclusion

This paper has considered a range of different types of entrenchment rule and the different reasons that might justify the use of entrenchment. It has argued that entrenchment is at its most attractive when the three elements of entrenchment connect: where the reason for entrenchment determines the form of entrenchment rule adopted, and sets the area of law that is entrenched. There are a number of situations in which the considerations surveyed in this paper will be relevant to constitutional actors.

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<sup>73</sup> See further J. O. McGinnis and M. B. Rappaport, *The Rights of Legislators and the Wrongs of Interpretation: A Further Defense of the Constitutionality of Legislative Supermajority Rules* 47 DUKE LAW JOURNAL 327 (1997).

<sup>74</sup> See J. Jaconelli, *Do Constitutional Conventions Bind?* 64 CAMBRIDGE L. J. 149 (2005), who argues many conventions rest on strategic considerations of this type.

First, and most obviously, they are applicable when a body is considering using entrenchment. Drafters of constitutions and legislators are the most common constitutional actors who may consider making use of entrenchment but, as we have seen, sometimes the court may also make use of the device.

Second, and less obviously, sometimes an institution may review the capacity of a constitutional actor to entrench. The question of whether a body should be permitted the power to entrench, and the reach of that power, will partly depend on the likelihood of the body using entrenchment in a positive manner. Often, this question falls to the courts, with judges determining the ability of a legislature to use entrenchment.<sup>75</sup> In the case of the filibuster, discussed above, it was the institution itself that reviewed its own capacity to entrench: given the internal rules of the Senate are outside of the jurisdiction of the courts,<sup>76</sup> it is for the Senate to determine the capacity of its past iterations to place limits on the present body.

Thirdly, the entrenching rule may require interpretation – it can be read broadly, or narrowly construed. The initial interpretation of the entrenching rule is often undertaken by those to whom it applies: a body considering legislating should consider whether it can act through the default rule or whether an entrenchment rule applies. Frequently, the courts will also have jurisdiction to interpret the rule; assessing whether the purported legislation has been validly enacted. In the course of interpretation, the arguments of this paper weigh for certain readings over others, shaping the way in which actors construe entrenchment rules that are overly narrow or overly broad. So far as the rules of interpretation and constraints of institutional competence permit, the entrenchment rule should be interpreted as attractively as possible. The role of the court in interpreting – and applying – the rule reminds us that entrenchment is often a collaborative exercise, with the institution creating the rule reliant on another body to render its operation successful.

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<sup>75</sup> As in Israel and Australia: CA 6821/93 *United Mizrahi Bank Ltd v. Migdal Collective* [1995] 49 (4) PD 221; R. Weill, *Reconciling Parliamentary Sovereignty and Judicial Review: The Theoretical and Historical Origins of the Israeli Legislative Override Power* 39 HASTINGS CONSTITUTIONAL LAW QUARTERLY 457 (2012); *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 395.

<sup>76</sup> J. CHAFETZ, *DEMOCRACY'S PRIVILEGED FEW* (2007), especially chapter 2. Though the point is not beyond dispute: Bondurant, note 66 above, 501-507

This paper has argued that entrenchment should be seen as a constitutional tool, a device, or set of devices, that can be used to solve certain problems: the temptation to regard entrenchment as unequivocally good, or invariably bad, should be resisted. Whilst a badly crafted entrenchment rule may be better than nothing, entrenchment is at its most attractive when the reason for departing from the default rule informs the type of entrenchment adopted and the area of laws entrenched. Reflection on these three elements should guide those considering using entrenchment and, also, those who interpret and apply the entrenchment rules.